No. 80-1524

APR 1 1981

ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA ANN TIFFANY
PATRICIA ANN'S COUNTRY STORE,

Petitioner

v.

COUNTY OF ALBEMARLE, VIRGINIA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

The respondent, the County of Albemarle, Virginia (hereinafter "the County"), does not seriously disagree with most of the recitations contained in the statement of facts in the petition for a writ of

certiorari filed on behalf of the petitioner. However, the County would respectfully note a number of additions, corrections, and/or clarifications.

First, it should be recognized that, at all times relevant to this application, the great majority of the land owned by the petitioner at this site (including the location of the existing store and the proposed store) was zoned agricultural. While several applications had been filed on behalf of the petitioner and/or her predecessors in title for various changes in the zoning status (including rezoning, special use permit, and the like), the property retained its original zoning. The existing store which is described in the petition exists by virtue of a special use permit granted the petitioner long before the commencement of this cause. This permit remains in effect, and the store remains in

operation under new management.

Secondly, the statement of facts recited in the petition leaves one with the impression that this property is located in or immediately adjacent to a built-up, urbanized area. In fact, although the uses recited do exist, they are of very low intensity and are spread out over a considerable stretch of highway; in fact, the area is, and at all times relevant to this cause has been, recognizably rural in character.

Thirdly, the petitioner recites that testimony by Mr. Keeler, the County's Assistant Director of Planning, tended to establish that the 1968 zoning ordinance in effect at the time of the trial of this cause was grossly in conflict with the County's adopted comprehensive plan. In fact, the testimony was that while the existing zoning <u>map</u> was significantly in

conflict with the plan, this was true, if at all, only to a much lesser degree as to the text of the ordinance. Mr. Keeler likewise testified that, at the time of the trial, the County was in the midst of preparing a new comprehensive zoning ordinance and map which would be much more nearly in compliance with the adopted comprehensive plan. Since the time of trial, such an ordinance and map have been adopted and are now in effect.

STATEMENT OF PROCEEDINGS BELOW

No statement of proceedings below appearing in the Petition for Writ of Certiorari, such a statement is included here for clarity.

This cause was commenced by Motion for Declaratory Judgment and Bill of Complaint for Injunction filed on behalf of petitioner on or about September 27, 1979,

in the Circuit Court of Albemarle County, Virginia, a court of record having general jurisdiction within the County. An answer was timely filed on behalf of the County. The object of the suit was to overturn the legislative act of the Board of Supervisors, the County's governing body, denying a special use permit for a retail store as requested by petitioner.

Trial was held on November 15 and 16, 1979, before the Honorable David F. Berry, Judge, sitting without a jury. At the close of the evidence and argument, the court took the matter under advisement. By letter opinion dated December 21, 1979, the court announced its decision, the final order being entered on April 18, 1980. See Appendix B.

The petitioner noted her appeal and petitioned the Supreme Court of Virginia for appeal on or about July 16, 1980. The

petition for appeal was denied on December 4, 1980.

SUMMARY OF ARGUMENT

The instant cause presents no substantial issue of federal law for the following reasons:

First, the standards for judicial review of the actions of local legislative bodies in the zoning context as prescribed by the Virginia Supreme Court are well-established and are consistent with the constitutional standards enunciated by this Court.

Second, the Albemarle County zoning ordinance contains sufficient standards for decision to satisfy the requirements of due process and equal protection of the law. The decision complained of was based on the standards for decision and was supported by the evidence.

ARGUMENT

I. THE STANDARD FOR JUDICIAL REVIEW OF LEGISLATIVE ACTS IN ZONING IS WELL-ESTABLISHED AND CONSTITUTIONAL.

The County agrees with the petitioner that Virginia law is clear as to the legislative character of a special use permit. Civic Association v. Chesterfield County, 215 Va. 399 (1974); City of Richmond v. Randall, 215 Va. 506 (1975); Byrum v. Board of Supervisors of Orange County, 217 Va. 37 (1976); Bollinger v. Board of Supervisors of Roanoke County, 217 Va. 185 (1976). However, it is simply an incorrect statement of Virginia law that the legislative body "has total discretion to grant a use permit or deny it." In fact, the standard for reviewing a special use permit denial/grant is essentially indistinguishable from that applicable to an application for amendment to the zoning map (i.e., a rezoning); the action of the

local legislative body (e.g., the Board of Supervisors) is presumed valid and will not be overturned by the court unless it is shown to be unreasonable, arbitrary or capricious; and if reasonableness be fairly debatable, it must be sustained. Gorieb v. Fox, 145 Va. 554 (1926), affirmed 274 U.S. 603 (1927); National Maritime Union v. City of Norfolk, 202 Va. 672 (1961); Martin v. City of Danville, 148 Va. 247 (1927).

Thus, the proper question is not whether there are standards for review of a special use permit, but what degree of specificity is required of such standards. As the Virginia Court pointed out in National Maritime, a legislative act is by its very nature, susceptible of only general standards. The Court went on to state that sufficient safeguards "against an arbitrary and uncontrolled exercise of dis-

cretion" were included when the ordinance specified (1) primary standards for carrying out a legislative policy; (2) a clear-cut principle to which a given application must conform; and (3) a clear and definite procedure for reviewing applications. National Maritime Union v. City of Norfolk, supra at 682.

The Virginia Court has subsequently made clear that no standards need be particularly specified in the ordinance in any case where the governing body of the locality (as in Albemarle County) is the body which reviews applications for special use permits and where the ordinance contains general provisions concerning its purposes and intent and outlines for its administration. Byrum v. Board of Supervisors of Orange County, 217 Va. 37 (1976); Bollinger

v. Board of Supervisors of Roanoke County, 217 Va. 185 (1976).[1] The Virginia Court has most recently clarified the state of the law in the case of Cole v. City Council of Waynesboro, 218 Va. 827 (1978), in saying:

> When the governing body of any locality reserves unto itself the right to issue special exceptions or use permits, as it is permitted by Code § 15.1-491, we have held that the granting of such exceptions and permits is a legislative function. Byrum, supra; Bollinger, supra; and Maritime, supra. . . . [I]n each case we specifically found that the enabling statutes, together with the zoning ordinances under which the counties and the city were acting, set forth the purposes and intent of the zoning ordinances and contained sufficient outlines and standards

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[1] A distinction has been made where some administrative agent of the locality is delegated the authority of reviewing such applications. The Virginia Court has stated (in dictum) that more specific standards are required in such cases. Byrum v. Board of Supervisors of Orange County, supra; Cole v. City Council of Waynesboro, supra; see also Board of Zoning Appeals of Fairfax County v. Cedar Knoll, Inc., 217 Va. 740 (1977).

for enacting and administering them. 218 Va. at 837.

The standards for review of the County's action in this cause are, therefore, anything but novel. See 3 Rathkopf, The Law of Planning and Zoning (4th ed.), pp. 41-82 et seq. Indeed, the rule for court review of a legislative act in zoning was clearly enunciated by the Virginia Supreme Court and by this Court in the early case of Gorieb, and specifically made applicable to the modern special use permit context in Virginia by the holding in the National Maritime case (202 Va. at 681). Gorieb v. Fox; City of Richmond v. Randall; Byrum v. Board of Supervisors of Orange County, all supra; see also Ours Properties, Inc. v. Ley, 198 Va. 848 (1957). The County's research has failed to disclose any case in which the standard enunciated by this Court in Gorieb has ever

been substantially altered. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Penn Central Transportation Corp. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. ____ (1980).

At this stage of the proceedings, the petitioner has raised for the first time the specter of a zoning ordinance where "practically all uses" are available only by special use permit. See Petition for Appeal at p. 19. The County submits that the Virginia Supreme Court has effectively outlawed this type of ordinance as a matter of Virginia law. Matthews v. Greene County and Boards, 218 Va. 270 (1977). This is therefore one straw man that this Court has no need to knock over.

II. THE STANDARDS FOR DECISION IN THE FORMER ALBEMARLE COUNTY ZONING ORDINANCE EXCEED THE MINIMUM REQUIRED BY LAW AND THE BOARD OF SUPERVISORS' DECISION WAS BASED THEREON AND SUPPORTED BY THE EVIDENCE.

The petitioner has argued that Virginia law contains inadequate safeguards gainst governmental abuse, and these arguments are discussed hereinabove. However, it is respectfully submitted that the County went far beyond the requirements of Gorieb and its progeny in enacting its zoning ordinance and had in fact included specific standards for special permit review. These standards included an exclusive list of uses permissible by special use permit (§ 2-1-25) (a list conspicuously absent in Cole) and criteria set forth in § 11-13 (cited at p. 13 of the Petition for Appeal). It was these criteria, together with the County's Comprehensive Plan, which were addressed by the

trial court in its decision of the case after hearing evidence for two days. See letter opinion of Judge David F. Berry, December 21, 1979, included as Appendix A.

There is no question raised that the standards set forth in the ordinance are improper or inadequate. Indeed, it is submitted that the ordinance as written is consistent with even the strictest standards for review and reflects both the intent of the enabling statutes and well-established general zoning principles. See Rathkopf, op. cit. § 41.09; see also Virginia Code (1950) § 15.1-495(b)(3); § 15.1-495(f); § 15.1-491(e); § 15.1-489 (1973 Replacement Volume, 1980 Cumulative Supplement).

In addition, the consideration of the Comprehensive Plan in zoning decisions is deeply engrained in Virginia jurisprudence. National Maritime Union v. City of

Norfolk; City of Richmond v. Randall, both supra; see also Board of Supervisors of Fairfax County v. Jackson, ____ Va. ____, 221 VRR 342 (1980); Board of Supervisors of Fairfax County v. Allman, 215 Va. 434 (1975); Board of Supervisors of Loudoun County v. Lerner, 221 Va. 267 (1980); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). The trial court's decision in this cause was expressly based upon competent, credible evidence and upon the above-cited standards for judicial review.

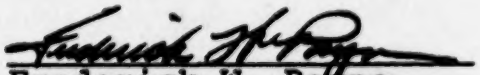
Accordingly, even were this Court to conclude that the general Virginia law regarding judicial review of special use permit decisions by local legislative bodies is somehow defective, it is respectfully submitted that the Albemarle County ordinance and the instant decision fully comply with even the most stringent conceptions

of fundamental fairness -- including those set forth in the Petition for Appeal.

CONCLUSION

For the foregoing reasons, the County respectfully prays that the writ of certiorari sought by petitioner be denied and that the County have judgment against the petitioner for its costs in this behalf expended.

Respectfully submitted,



Frederick W. Payne
Deputy County Attorney
for Albemarle County

Counsel for Respondent

STATEMENT OF MAILING

I, Frederick W. Payne, a member of the Bar of the Supreme Court of the United States, hereby certify that on this 31st day of March, 1981, I personally mailed the foregoing Brief in Opposition to Petition for Writ of Certiorari by first class mail by placing it at the United States Post Office at Charlottesville, Virginia, postage prepaid, addressed to the Clerk of the Supreme Court of the United States, within the time permitted by the rules of the Court therefor.

Frederick W. Payne

Subscribed and sworn to before me, a Notary Public for the State of Virginia at Large, this 31st day of March, 1981.

Notary Public

My commission expires:
July 2, 1983

CERTIFICATE

I hereby certify that I have forwarded by ordinary mail three (3) copies of this Brief in Opposition to Petition for Writ of Certiorari to H. H. Tiffany, Esquire, Post Office Drawer C, Waynesboro, Virginia 22980, on this 31st day of March, 1981, and have mailed a true copy hereof to the Supreme Court of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219, on this 31st day of March, 1981.

Frederick W. Payne

APPENDIX A

COMMONWEALTH OF VIRGINIA
SIXTEENTH JUDICIAL CIRCUIT

December 21, 1979

H. H. Tiffany, Esquire
Brandon Ladd Circle
Waynesboro, Virginia 22980

Frederick W. Payne, Esquire
Deputy County Attorney
416 Park Street
Charlottesville, Virginia 22901

In Re: Tiffany v. County of Albemarle
Case No. 2871-C

Gentlemen:

During the trial of this case all issues were effectively disposed of except the question of whether or not the County produced evidence of reasonableness in denying the Special Use Permit sufficient to make the question fairly debatable. You will recall that at the conclusion of the Plaintiff's evidence, and upon a motion to strike by the County, I ruled that the presumption

of legislative validity has been properly challenged by the Plaintiff by producing probative evidence of unreasonableness and the motion to strike was denied.

At the conclusion of all the evidence I reviewed the objective criteria set forth in the Albemarle County Zoning Ordinance, Section 11-13-1, and found that there was no evidence upon which it could be said that the issuance of the Special Use Permit in question would be of substantial detriment to adjacent property or that such use would not be in harmony with the uses permitted by right in the district or with the public health, safety and general welfare. I reserved judgment, however, on the question of whether or not the uses sought by the Plaintiff would be in harmony with the purpose and intent of the Zoning Ordinance and whether the character of the district would be changed thereby. It is upon these

two latter considerations that the case is now to be decided.

In making this determination, the 1977 Comprehensive Plan of Albemarle County must be considered. The evidence of the Plaintiff clearly established business and commercial activities already underway or already permitted by existing use or existing zoning in the immediate area. You will also recall that many of the questions regarding existing zoning and other permitted uses around the interchange came from the bench. Perhaps the concept of interchange property being properly suitable for commercial use is erroneous. This was apparently realized by the professional planners in evaluating and updating the County Comprehensive Plan, and, on the surface, there appears to be a distinct conflict between the Zoning Map on the one hand and the goals and objectives of the Comprehensive Plan on

the other. In my opinion, the action of the Board of Supervisors in denying the Plaintiff's application must be viewed more in the context of the Comprehensive Plan than in the context of the existing zoning and other uses in the area in question.

One of the Comprehensive Plan's stated goals and objectives with relation to commercial properties is the establishment of small scale commercial areas in a variety of locations so as to reduce automobile dependency, so long as the use of the County's highways is not impaired and safety hazards are not created. Taken at face value, this would appear to support the Plaintiff's application. Taking the Comprehensive Plan as a whole, however, it can be seen that commercial development in the western part of the County is to be discouraged south of Route 250 and en-

couraged in the Crozet area. Furthermore, the preservation of the rural atmosphere of the western portion of the County is strongly encouraged as a long range objective. Thus, while the granting of the Special Use Permit may be considered in keeping with past commercial uses, the expansion of commercial uses in those rural areas outside of the Crozet business area is strongly discouraged under the Comprehensive Plan.

It seems to me, therefore, that the action of the Board of Supervisors in denying the Special Use Permit, when viewed in the light of the Comprehensive Plan for Albemarle County, is at the very least, fairly debatable.

An Order should be prepared denying Plaintiff's motion to declare the Zoning Ordinance invalid and void, and denying

the prayer for relief by injunction against the enforcement thereof. No relief, in my opinion, can be awarded the Plaintiff in this action.

Very truly yours,

/s/ David F. Berry
David F. Berry

DFB/je

APPENDIX B

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF ALBEMARLE

PATSY ANN TIFFANY
doing business as
PATRICIA ANN'S COUNTRY STORE

Case No.
2871C

V.

ORDER

COUNTY OF ALBEMARLE

This cause came on the 15th and 16th days of November, 1979, to be heard on the motion for declaratory judgment and bill for injunction filed on behalf of the plaintiff; on the answer of the defendant; upon exhibits filed and evidence heard ore tenus on behalf of the parties, respectively; and was argued by counsel;

And it appearing to the Court from the evidence aforesaid that the Albemarle County Zoning Ordinance is lawful and constitutional

as applied to the property here in question and that the denial by the Board of Supervisors of the special use permit complained of in this cause is fairly debatable;

It is accordingly ADJUDGED, ORDERED and DECREED that the relief prayed for in the said motion for declaratory judgment and bill for injunction be, and it hereby is, denied, for the reasons stated in the letter opinion of the Court.

And this cause is ended.

ENTER: /s/ DAVID F. BERRY
JUDGE

DATE: 4-18-80

I ASK FOR THIS:

GEORGE R. ST. JOHN
County Attorney

By /s/ Frederick W. Payne
Frederick W. Payne
Deputy County Attorney
416 Park Street
Charlottesville, Virginia 22901
Counsel for Defendant

SEEN AND OBJECTIONS NOTED:

/s/ H. H. Tiffany
Henry H. Tiffany